

STATE OF MICHIGAN
IN THE SUPREME COURT

COUNTY ROAD ASSOCIATION OF MICHIGAN
A Michigan nonprofit corp. & CHIPPEWA COUNTY
ROAD COMMISSION, a public body corporate,

Plaintiffs-Appellants,

-vs-

Supreme Court
No. 125665

JOHN M. ENGLER, GOVERNOR OF THE STATE
OF MICHIGAN, GREG ROSINE, DIRECTOR OF THE
MICHIGAN DEPARTMENT OF TRANSPORTATION,
MICHIGAN DEPARTMENT OF TRANSPORTATION,
DUANE E. BERGER, DIRECTOR OF THE MICHIGAN
DEPARTMENT OF MANAGEMENT & BUDGET,
MICHIGAN DEPARTMENT OF MANAGEMENT &
BUDGET, DONALD H. GILMORE, STATE BUDGET
DIRECTOR, DOUGLAS B. ROBERTS, STATE
TREASURER, MICHIGAN DEPARTMENT OF
TREASURY, CANDICE S. MILLER, SECRETARY
OF STATE & MICHIGAN DEPARTMENT OF STATE,

Court of Appeals
No. 245767

Ingham County Circuit Court
No. 02 000308 CZ

Defendants-Appellees,

-and-

MICHIGAN PUBLIC TRANSIT ASSOCIATION,
ANN ARBOR TRANSPORTATION AUTHORITY,
SUBURBAN MOBILITY AUTHORITY FOR
REGIONAL TRANSPORTATION, CAPITAL AREA
TRANSPORTATION AUTHORITY MICHIGAN
ROAD BUILDERS ASSOCIATION AND
ASSOCIATION UNDERGROUND CONTRACTORS,

Intervening-Appellants,

NOTICE OF HEARING

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

BRIEF OF AMICUS CURIAE THE MICHIGAN MUNICIPAL LEAGUE

PROOF OF SERVICE

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_____ /

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

NOW COMES the Michigan Municipal League, by and through its attorneys,
Plunkett & Cooney, P.C., and respectfully requests pursuant to MCR 7.306(C) and MCR
7.313 that this Court grant the within motion for the following reasons:

1. The Michigan Municipal League is a non-profit Michigan corporation whose purpose is the improvement of municipal government and administration through cooperative effort and whose membership is comprised of some 511 Michigan cities and villages of which 430 are also members of the Michigan Municipal League Legal Defense Fund.

2. The Michigan Municipal League operates the Legal Defense Fund through a board of directors. This brief *amicus curiae* is authorized by the board of directors of the Michigan Municipal League Legal Defense Fund whose membership includes: the president and executive director of the Michigan Municipal League, and the officers and directors of the Michigan Association of Municipal Attorneys: William B. Beach, city attorney, Rockwood; John E. Beras, city attorney, Southfield; Randall L. Brown, city attorney, Portage; Ruth Carter, corporation counsel, Detroit; Peter Doren, city attorney, Traverse City; Bonnie Hoff, city attorney Marquette; Andrew J. Mulder, city attorney, Holland; Clyde Robinson, city attorney, Battle Creek; Debra A. Walling, corporation counsel, Dearborn; Eric D. Williams, city attorney, Big Rapids; and William C. Mathewson, general counsel, Michigan Municipal League.

3. In bringing the within motion, *Amicus Curiae* seeks leave to file a brief in support of the County Road Association of Michigan's application for leave to appeal. In particular, *amicus curiae* urges the Court to grant the CRAM's request for leave to appeal in order to settle the limits of the Governor's authority to reduce expenditures by executive order from funds that are constitutionally dedicated for specific purposes. Const 1963, art 5, § 20. This appeal also offers the Court to clarify the proper

interpretation of art 9, § 9 as it relates to the general sales tax revenue that forms part of the Comprehensive Transportation Fund (CTF).

4. On behalf of its member entities, the Michigan Municipal League believes that the issues raised by the CRAM are highly significant and worthy of review. Like CRAM, amicus curiae invites the Court to ultimately reiterate Michigan's continuing adherence to the judicial enforcement of constitutionally imposed mandates regarding the use of dedicated funds. Any other result would seriously undermine Michigan's constitutional protections for these funds contrary to the people's command by adopting art 9, § 9. Related to this, is the need for this Court to make clear that expenditures cannot be reduced from funds that are constitutionally dedicated for specific purposes.

5. Because the Court's ruling on the CRAM's application for leave to appeal will have a substantial impact upon the membership of the Michigan Municipal League, the participation of amicus curiae in this Court's consideration and resolution of the request for leave to appeal is essential.

6. Amicus Curiae has an obvious interest in the development of a correct interpretation of art 5, § 20 and art 9, § 9. Members of the Michigan Municipal League with responsibilities for transportation, highway construction, and related matters depend upon these dedicated funds to perform their obligations. They have an important interest in ensuring that the constitutionally-mandated protection of these funds is effectuated by the judiciary as the people of Michigan understood would happen when they adopted these provisions.

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ASSOCIATION UNDERGROUND CONTRACTORS,

Intervening-Appellants,

**THE MICHIGAN MUNICIPAL LEAGUE'S AMICUS CURIAE
BRIEF IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL**

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TABLE OF CONTENTS

	<u>Page</u>
INDEX TO AUTHORITIES.....	i
STATEMENT OF THE QUESTION INVOLVED	ii
STATEMENT OF FACTS.....	1
ARGUMENT	2
THIS COURT SHOULD GRANT LEAVE TO APPEAL TO DECIDE WHETHER THE GOVERNOR’S AUTHORITY UNDER ART 5, § 20 ALLOWS THE REDUCTION OF FUNDS FROM THE COMPREHENSIVE TRANSPORTATION FUND, A FUND CONSTITUTIONALLY DEDICATED FOR SPECIFIC PURPOSES.....	2
A. The Issue Presented In CRAM’s Application For Leave To Appeal Is a Matter Of Public Interest And Requires A Clear And Immediate Resolution.	2
B. Article 5, § 20 Governs The Governor’s Reduction Of Expenditures.....	3
C. The Governor Lacks Authority To Reduce Expenditures By Diverting Funds That Are Constitutionally Dedicated For Specific Purposes.....	4
D. Art 9, § 9 Dedicates Specified Taxes To Funds For Comprehensive Transportation Purposes.	7
RELIEF.....	11

INDEX TO AUTHORITIES

Page

MICHIGAN CASES

<i>Federated Publications, Inc v Michigan State University Bd of Trustees</i> , 460 Mich 75; 594 NW2d 491 (1999).....	5
<i>Michigan United Conservation Clubs v Secretary of State</i> , 464 Mich 359; 630 NW2d 297 (2001).....	5
<i>People v Bulger</i> , 462 Mich 495; 614 NW2d 103 (2000).....	5
<i>WPW Acquisition Co v City of Troy</i> , 466 Mich 117; 643 NW2d 564 (2002).....	6, 9

COURT RULES

MCR 7.302	2
MCR 7.302(3)	4

CONSTITUTIONAL PROVISIONS

Const 1963, art 5, § 20	2, 3, 4, 5, 6
Const 1963, art 9, § 9	3, 6, 7, 8, 9

LEGAL TREATISES AND TEXTS

1 Cooley, Constitutional Limitations (6 th ed), p 81	5
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STATEMENT OF THE QUESTION INVOLVED

SHOULD THIS COURT GRANT LEAVE TO APPEAL TO DECIDE WHETHER THE GOVERNOR'S AUTHORITY UNDER ART 5, § 20 ALLOWS THE REDUCTION OF FUNDS FROM THE COMPREHENSIVE TRANSPORTATION FUND, A FUND CONSTITUTIONALLY DEDICATED FOR SPECIFIC PURPOSES?

CRAM and the Chippewa County Road Commission answer “yes.”

The State Defendants answer “no.”

Intervening Parties, the Michigan Public Transit Association, Ann Arbor Transportation Authority, and Capital Area Transportation Authority answer “yes.”

Amicus Curiae Michigan Municipal League answers “yes.”

The Court of Appeals would presumably answer “no.”

The trial court would presumably answer “yes.”

STATEMENT OF FACTS

The Michigan Municipal League relies upon the statement of facts as set forth in application for leave to appeal filed by the County Road Association of Michigan and the Chippewa County Road Commission.

ARGUMENT

THIS COURT SHOULD GRANT LEAVE TO APPEAL TO DECIDE WHETHER THE GOVERNOR'S AUTHORITY UNDER ART 5, § 20 ALLOWS THE REDUCTION OF FUNDS FROM THE COMPREHENSIVE TRANSPORTATION FUND, A FUND CONSTITUTIONALLY DEDICATED FOR SPECIFIC PURPOSES.

A. The Issue Presented In CRAM's Application For Leave To Appeal Is a Matter Of Public Interest And Requires A Clear And Immediate Resolution.

This Court typically limits its consideration of appeals to those set forth in MCR

7.302. That rule sets forth the grounds for granting an application for leave to appeal:

(1) the issue involves a substantial question as to the validity of a legislative act;

(2) the issue has significant public interest and the case is one by or against the state or one of its agencies or subdivisions or by or against an officer of the state or one of its agencies or subdivisions in the officer's official capacity;

(3) the issue involves legal principles of major significance to the state's jurisprudence;

(4) in an appeal before decision by the Court of Appeals,

(a) delay in final adjudication is likely to cause substantial harm, or

(b) the appeal is from a ruling that a provision of the Michigan Constitution, a Michigan statute, a rule or regulation included in the Michigan Administrative Code, or any other action of the legislative or executive branch of state government is invalid;

(5) in an appeal from a decision of the Court of Appeals, the decision is clearly erroneous and will cause material injustice or the decision conflicts with a Supreme Court decision or another decision of the Court of Appeals; or

(6) in an appeal from the Attorney Discipline Board, the decision is erroneous and will cause material injustice.

Application of these provisions to the issues presented for review confirms that this is a grant-worthy application for leave to appeal.

B. Article 5, § 20 Governs The Governor's Reduction Of Expenditures.

Article 5, section 20 governs the governor's right to reduce expenditures in lean budget times. The text is as follows:

No appropriation shall be a mandate to spend. The governor, with the approval of the appropriating committees of the house and senate, shall reduce expenditures authorized by appropriations whenever it appears that actual revenues for a fiscal period will fall below the revenue estimates on which appropriations for that period were based. Reductions in expenditures shall be made in accordance with procedures prescribed by law. The governor may not reduce expenditures of the legislative and judicial branches or from funds constitutionally dedicated for specific purposes.

The Convention Comment explains the basis for the final sentence:

The final sentence protects the separation of powers doctrine by preventing executive reduction of expenditures for the coordinate legislative and judicial branches of government. It would also prohibit the governor from making reductions in funds dedicated by the constitution for specific purposes.

In its decision interpreting and applying this provision in connection with art 9, § 9, the Court of Appeals held that general sales tax revenues apportioned to the Comprehensive Transportation Fund are not constitutionally decided funds. (Opinion, pp 4-5). As a result, the Court concluded that it was an abuse of discretion to issue a preliminary injunction to prevent the reduction of these funds, reached the merits at this

stage of the proceedings, and directed the trial court “on remand to enter a judgment on the merits of this case.” (Opinion, p 6).

It is critical for this Court to resolve these issues in order to ensure funds are used as constitutionally mandated. If this Court does not act now, the governmental entities that seek to use these funds will be essentially prevented from making timely budget decisions because they lack a decision from this Court resolving outstanding issues. The longer this Court waits to decide the jurisprudentially significant issues, the more dollars will be at stake if any ruling overturns prior decisions. Thus, immediate review is necessary to timely set forth the rules for spending from the Michigan Transportation Fund.

The application for leave to appeal also raises legal principles of major significance to the state’s jurisprudence. MCR 7.302(3). It offers the Court the opportunity to clarify whether these are constitutionally dedicated funds, to evaluate the proper use of dedicated funds, and the Governor’s authority to reduce expenditures from these funds. It also presents the Court with the opportunity to consider its role in interpreting constitutional provisions such as this one. Leave should therefore be granted.

C. The Governor Lacks Authority To Reduce Expenditures By Diverting Funds That Are Constitutionally Dedicated For Specific Purposes.

The Michigan Constitution authorizes the governor to reduce expenses when revenue is less than anticipated. But this power is strictly limited by the text of the constitutional provision. Article 5, § 20 provides:

No appropriation shall be a mandate to spend. The governor, with the approval of the appropriating committees of the house and senate, shall

reduce expenditures authorized by appropriations whenever it appears that actual revenues for a fiscal period will fall below the revenue estimates on which appropriations for that period were based. Reductions in expenditures shall be made in accordance with procedures prescribed by law. The governor may not reduce expenditures of the legislative and judicial branches or from funds constitutionally dedicated for specific purposes.

Const 1963, art 5, § 20. The issue presented in this case arises out of interpretation of the last sentence of this provision.

This Court has embraced clear guidelines for interpreting constitutional text. The primary goal in “construing a constitutional provision - in marked contrast to a statute or other texts - is to give effect to the intent of the people of the state of Michigan who ratified the constitution, by applying the rule of ‘common understanding.’” *Michigan United Conservation Clubs v Secretary of State*, 464 Mich 359; 630 NW2d 297 (2001). To do so, this Court looks to the “plain meaning as understood by its ratifiers at the time of its adoption.” *People v Bulger*, 462 Mich 495; 614 NW2d 103 (2000). This Court has reaffirmed its acceptance of Justice Cooley’s explanation of the rule of common understanding:

A constitution is made for the people and by the people. The interpretation that should be given it is that which reasonable minds, the great mass of the people themselves, would give it. “For as the Constitution does not derive its force from the convention which framed, but from the people who ratified it, the intent to be arrived at is that of the people, and it is not to be supposed that they have looked for any dark or abstruse meaning in the words employed, but rather that they have accepted them in the sense most obvious to the common understanding, and ratified the instrument in the belief that that was the sense designed to be conveyed.”

Federated Publications, Inc v Michigan State University Bd of Trustees, 460 Mich 75, 85; 594 NW2d 491 (1999) quoting 1 Cooley, *Constitutional Limitations* (6th ed), p 81.

This approach is “essentially a search for the original meaning attributed to the words of the constitution by those who ratified it.” 464 Mich at 374. Under this interpretive approach, constitutional limitations are to be given effect. See e.g., *WPW Acquisition Co v City of Troy*, 466 Mich 117; 643 NW2d 564 (2002).

The constitutional limitation at issue here is the last sentence of art 5, § 20. That provision prohibits the governor from reducing expenditures “from funds constitutionally dedicated for specific purposes.” Const 1963, art 5, § 20. The Court of Appeals read this to mean that moneys placed into the Comprehensive Transportation Fund could nonetheless be reduced because art 9, § 9 does not dedicate any portion of the general sales tax revenue to comprehensive transportation purposes. But this interpretation fails to adequately take into account the language of art 5, § 20. That language bars a reduction “from funds” that are constitutionally dedicated.

The Comprehensive Transportation Fund is a fund holding constitutionally dedicated revenues. It holds funds that have been dedicated pursuant to the last sentence of art 9, § 9. That sentence reads as follows:

The legislature may authorize the incurrence of indebtedness and the issuance of obligations pledging the taxes allocated or authorized to be allocated by this section, which obligations shall not be construed to be evidence of state indebtedness under this constitution.

The sentence contains language dedicating these funds to comprehensive transportation purposes as defined by law. It mandates that these funds are to be used exclusively for that purpose. Although the last clause dedicating funds is proportionate, it requires “not more than 25 percent of the general sales taxes...” to “be used exclusively for the

transportation purposes of comprehensive transportation purposes as defined by law.”

Const 1963, art 9, § 9. Thus, these are constitutionally dedicated funds. As such, the governor lacks authority to divert funds in the Comprehensive Transportation Fund once they have been allocated to that fund.

D. Art 9, § 9 Dedicates Specified Taxes To Funds For Comprehensive Transportation Purposes.

The Michigan Constitution strictly limited the use of both specific and general taxes imposed directly or indirectly on specified transportation-related goods and services. Const 1963, art 9, § 9. The text of that provision is as follows:

All specific taxes, except general sales and use taxes and regulatory fees, imposed directly or indirectly on fuels sold or used to propel motor vehicles upon highways and to propel aircraft and on registered motor vehicles and aircraft shall, after the payment of necessary collection expenses, be used exclusively for transportation purposes as set forth in this section.

Not less than 90 percent of the specific taxes, except general sales and use taxes and regulatory fees, imposed directly or indirectly on fuels sold or used to propel motor vehicles upon highways and on registered motor vehicles shall, after the payment of necessary collection expenses, be used exclusively for the transportation purposes of planning, administering, constructing, reconstructing, financing, and maintaining state, county, city, and village roads, streets, and bridges designed primarily for the use of motor vehicles using tires and reasonable appurtenances to those state, county, city, and village roads, streets, and bridges.

The balance, if any, of the specific taxes, except general sales and use taxes and regulatory fees, imposed directly or indirectly on fuels sold or used to propel motor vehicles upon highways and on registered motor vehicles, after the payment of necessary collection expenses; 100 percent of the specific taxes, except general sales and use taxes and regulatory fees, imposed directly or indirectly on fuels sold or used to propel aircraft and on registered aircraft, after the payment of necessary collection expenses; and not more than 25 percent of the general sales taxes, imposed directly or indirectly on fuels sold to propel motor vehicles upon highways, on the sale of motor vehicles, and on the sale of the parts and accessories of motor vehicles, after the payment of necessary collection expenses; shall be used

exclusively for the transportation purposes of comprehensive transportation purposes as defined by law.

The legislature may authorize the incurrence of indebtedness and the issuance of obligations pledging the taxes allocated or authorized to be allocated by this section, which obligations shall not be construed to be evidence of state indebtedness under this constitution.

The language makes clear that all revenue from these specific taxes not including general sales and use taxes and regulatory fees, is to be “used exclusively for transportation purposes” except for “payment of necessary collection expenses.” *Id.* In other words, the provision was a constitutional limitation intended to protect the specified revenue from motor and aircraft fuels for transportation purposes. At the same time, it allowed for the “necessary” costs of collection to be deducted. *Id.*

The provision carefully and explicitly allocated not less than ninety percent of these specific taxes to “be used exclusively for the transportation purposes of planning, administering, constructing, reconstructing, financing, and maintaining state, county, city, and village roads, streets, and bridges designed primarily for the use of motor vehicles using tires, and reasonable appurtenances to those state, county, city, and village roads, streets, and bridges.” Const 1963, art 9, § 9. The provision also carefully allocated the balance to be used for “the purposes of comprehensive transportation purposes as defined by law.” *Id.* This balance included one hundred percent of the specific taxes excluding necessary collection expenses. *Id.* It included not more than twenty-five percent of the general sales taxes, “imposed directly or indirectly on fuels sold to propel motor vehicles upon highways, on the sale of motor vehicles, after the payment of necessary collection expenses.” *Id.* The language also makes clear that a specified percentage of the “general

sales taxes, imposed directly or indirectly on fuels sold to propel motor vehicles upon highways, on the sale of motor vehicles, after the payment of necessary collection expenses; shall be used exclusively for the transportation purposes of comprehensive transportation purposes as defined by law.” Const 1963, art 9, § 9. Both of these funds are constitutionally dedicated to specified purposes: in one case, to “transportation purposes” as defined in the section and in the other to “comprehensive transportation purposes” as “defined by law.” *Id.*

This Court has previously considered and rejected efforts to circumvent constitutional limits by expansively redefining language included in the constitutional text. *WPW Acquisition Co v City of Troy*, 466 Mich 117, 121; 643 NW2d 564 (2002). The City of Troy sought to increase an assessment by redefining the meaning of “additions” to include “increases in the value of property attributable to an increased occupancy rate,” a meaning inconsistent with the term as understood when adopted. This Court rejected the suggestion that the Legislature was entitled to redefine such terms at its will and have the Court defer to its redefinition. To the contrary, this Court refused to “adopt such a mode of interpretation [which] would, when applied in the future to other constitutional language, hollow out the people’s ability to place limits on legislative power.” *Id.* at 121.

That same reasoning applies here and supports the notion that this Court should grant leave to appeal to consider the meaning of “necessary collection expenses” as it was commonly understood when the constitution was adopted. Doing so, it can announce a rule that will assure that constitutionally dedicated funds are not raided during times of


fiscal difficulties by the unwarranted allocation of other programs to the expenses paid for out of dedicated funds. The issues presented in this appeal are matters of great jurisprudential significance. Leave should therefore be granted.

RELIEF

WHEREFORE, the Michigan Municipal League, by and through its attorneys,
Plunkett & Cooney, P.C., respectfully requests that this Court grant the application for
leave to appeal and grant it such other relief as is proper in law and equity.

Respectfully submitted,

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